Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JEFFERSON RANDOLPH CORPORATION d/b/a JRC TRUCKING, INC. and THURMAN CARPETS, INC.,

Petitioners,

v.

PROGRESSIVE DATA SYSTEMS, INC.; WILLIAM A.CROZIER and THOMAS G. TRAYLOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether state court jurists may decline judicial review of an arbitration award on grounds that the arbitrator "manifestly disregarded the law" when the award was entered pursuant to an arbitration proceeding explicitly called for and conducted pursuant to the Federal Arbitration Act.

STATEMENT PURSUANT TO RULE 29.6

Neither Petitioner has a parent company and no publicly held company owns 10% or more of the stock of either Petitioner.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Statutory and Arbitration Code Provisions Involved in this Case	1
Statement of the Case	3
Reasons for Granting the Petition	11
1. Because Virtually Every Federal Circuit Court Of Appeals Now Recognizes The Nonstatutory Ground Of "Manifest Disregard Of The Law" As A Valid Basis Of Judicial Review For Arbitration Awards Decided Pursuant To The Federal Arbitration Act, This Court Should Make Clear That State Court Jurists Cannot Decline To Vacate Arbitration Awards On Such Ground When The Federal Act Pertains.	11

Contents

Page

2. Because Arbitration Is An Increasingly Pervasive Reality Of Modern Commercial Life, This Court Should Act To Insure That Important Substantive Rights Are Not Lost Amidst The Move From Judicial To Arbitral Forums. 16

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Federal Cases:

Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990) 12

Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) 18

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 519 U.S. 980, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996) 17-18

Barnes v. Logan, 122 F.3d 820 (9th Cir. 1997) 14

Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) 17

Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010 (10th Cir. 1994) 11

Challenger Caribbean Corp. v. Union Gen. De Trabajadores de Puerto Rico, 903 F.2d 857 (1st Cir. 1990) 12

Circuit City v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) 18

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) 17

Cited Authorities

Page

Desiderio v. National Ass'n of Sec. Dealers, Inc., 191 F.3d 198 (2d Cir. 1999), *cert. denied*, 531 U.S. 1069, 121 S. Ct. 756, 148 L. Ed. 2d 659 (2001) .. 17

First Options of Chicago v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1985) 18

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) ... 17

Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034, 143 L. Ed. 2d 378, 119 S. Ct. 1286 (1999) 15

International Bhd. Of Firemen, Local 261 v. Great N. Paper Co., 765 F.2d 295 (1st Cir. 1985) 12

Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631 (10th Cir. 1988) 11, 14

Koveleskie v. SBC Capital Markets., Inc., 167 F.3d 361 (7th Cir. 1999), *cert. denied*, 528 U.S. 811, 120 S. Ct. 44, 145 L. Ed. 2d 40 (1999) 17

Lee v. Chica, 983 F.2d 883 (8th Cir.), *cert. denied*, 510 U.S. 906, 114 S. Ct. 287, 126 L. Ed. 2d 237 (1993) 14

McIlroy v. PaineWebber, Inc., 989 F.2d 817 (5th Cir. 1993) 14-15

Cited Authorities

Page

Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930 (2d Cir. 1986) 13, 14

Metz v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) 18

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) 13, 16, 18

Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456 (11th Cir. 1997) 8, 13, 14, 15

National Wrecking Co. v. International Broth. Of Teamsters, Local 731, 990 F.2d 957 (7th Cir. 1993) 14

O.R. Securities, Inc. v. Professional Planning Associates, Inc., 857 F.2d 742 (11th Cir. 1988) ... 14

Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 17

Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234 (1st Cir. 1995) 14

Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) 12

Cited Authorities

	Page
Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999)	17
Rotfeld v. Boenning & Scattergood, Inc., et al., 1991 U.S. Dist. LEXIS 11618 (E.D. Pa. August 20, 1991)	15
Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139, 119 S. Ct. 1028, 143 L. Ed. 2d 38 (1999), *abrogated on other grounds, Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002)	17
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 102 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)	13
Stroh Container Co. v Delphi Industries, Inc., 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2249, 90 L. Ed. 2d 695 (1986)	13
United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376 (3d Cir. 1995)	14
Upshur Corp. v. Erwin Behr GmbH. & Co., KG, 87 F.3d 844 (6th Cir. 1996)	14
Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9 (2d Cir. 1997)	14

Cited Authorities

	Page
Williams v. Cigna Financial Advisors, 197 F.3d 752 (5th Cir. 1999)	18
Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L. Ed. 168 (1953)	12, 13
Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991)	18
Federal Statutes:	
9 U.S.C. § 1, *et seq.*	1
9 U.S.C. § 10(a)	11
Other Authorities:	
American Heritage Dictionary	13
Black's Law Dictionary, 6th Edition 1990	13
O.C.G.A. § 9-9-1, *et seq.*	2
O.C.G.A. § 9-9-13(b)	2
O.C.G.A. § 11-2-718(1)	3, 6
Hayford, Stephen L., "Law In Disarray: Judicial Standards For Vacatur Of Commercial Arbitration Awards," 30 Ga. L. Rev. 731, Spring 1996	11, 12

TABLE OF APPENDICES

Page

Appendix A — Order Of The Supreme Court Of Georgia Denying Motion For Reconsideration Dated September 16, 2002 ..... 1a

Appendix B — Opinion Of The Supreme Court Of Georgia Dated And Decided July 15, 2002 ..... 2a

Appendix C — Opinion Of The Court of Appeals Of Georgia Dated And Decided July 31, 2001 ..... 13a

Appendix D — Order Confirming Arbitration Award Of The Superior Court Of Gwinnett County, State Of Georgia Dated February 9, 2001 And Filed February 12, 2001 ..... 24a

Appendix E — Final Judgment Of The Superior Court Of Gwinnett County, State Of Georgia Dated February 9, 2001 And Filed February 12, 2001 ..... 28a

Appendix F — American Arbitration Association, Arbitration Tribunal Dated August 18, 2000 .... 30a

Petitioners Jefferson Randolph Corporation and Thurman Carpets, Inc. ("JRC/Thurman") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINIONS BELOW

The arbitration award dated August 18, 2000 is unpublished. It is reprinted for purposes of this petition in the Appendix ("App.") at App. F. The judgment entered by the trial court is reprinted at App. E. The opinion of the Court of Appeals of Georgia is published at 251 Ga. App. 1 (2001) and is reprinted at App. C. The opinion of the Supreme Court of Georgia is published at 275 Ga. 420 (2002) and is reprinted at App. B.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Georgia denying Petitioner's motion for reconsideration was entered on September 16, 2002. (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND ARBITRATION CODE PROVISIONS INVOLVED IN THIS CASE

(1) The United States Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, specifically, § 10(a), provides,

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(2) The Georgia Arbitration Code, Official Code of Georgia Annotated ("O.C.G.A.") § 9-9-1, *et seq.*, specifically, § 9-9-13(b), provides,

The award shall be vacated on the application of a party who either participated in the arbitration or was served with a demand for arbitration if the court finds that the rights of that party were prejudiced by:

(1) Corruption, fraud or misconduct in procuring the award;

(2) Partiality of an arbitrator appointed as a neutral;

(3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or

(4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.

(3) O.C.G.A. § 11-2-718(1) provides,

> Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

STATEMENT OF THE CASE

On May 24, 1996, Petitioner Jefferson Randolph Corporation ("JRC") entered into an Equipment Sales, Software License And Services Agreement with Progressive Data Systems, Inc. ("PDS") (the "Agreement"). The Agreement called for the delivery of a computer hardware and software system to be used in JRC's business. JRC is

engaged primarily in the trucking business and, at the time this dispute arose, hauled carpet inventory for a variety of carpet manufacturers. It was also engaged in the sale of carpet products. JRC sought a computer system to track the movements of its trucks and inventory and to process the carpet transactions in which it was involved.

The Agreement specified a purchase price of $167,935.26. (L-1). JRC paid this amount in full.

Among the features promised to JRC was a Distribution Modification to PDS's basic software deliverable. This modification, which PDS explained would require custom software work, was to encompass the distribution functions of order entry, inventory and purchasing. It is JRC's contention that, as late as 15 months following contract signing, PDS never delivered a completed Distribution Modification. This delay caused JRC enormous productivity costs as it struggled to use the inadequate system it had and to work with PDS to bring the new system on line. In time, JRC came to see PDS principals William A. Crozier, Jr. ("Crozier") and Thomas G. Traylor ("Traylor") as having delivered false and untrue representations concerning the work that they would perform. It was for that reason JRC named the two men as co-defendants in a legal action filed on April 22, 1999 in the Superior Court of Gwinnett County, Georgia.

Prior to filing, JRC gave notice to PDS of its rescission of the Agreement based on false and untrue statements of performance by Messrs. Crozier and Traylor. Those statements encompassed the men's stated intention to provide certain features as part of the PDS Distribution Modification, their intention to provide them in a timely manner, and to deliver other contract services.

With their responsive pleadings, PDS and its principals filed a motion to add an indispensable party, Thurman Carpets, Inc., ("Thurman"), a purported user of the PDS System. PDS additionally moved to stay the proceedings and to compel arbitration of the dispute pursuant to the Federal Arbitration Act ("FAA"). (L-11 - L-29). On December 8, 1999 the trial court ordered the parties to proceed to arbitration but made no ruling regarding the status of Thurman.

PDS thereafter filed a Demand For Arbitration with the American Arbitration Association ("AAA"), naming JRC as respondent. Through discussions with AAA case management personnel, an agreement was reached to include Messrs. Crozier and Traylor as additional claimants and Thurman as an additional respondent.

In its Demand, PDS asserted breach of contract and sought recovery of compensatory damages for accelerated software license fees covering a period of 18 years and 3 months following JRC's rescission. As to these fees, PDS relied on an acceleration provision contained in the parties' Agreement. PDS also asserted a breach of confidentiality as well as fraud on JRC/Thurman's part in attempting "to exploit benefits . . . that were not part of the Agreement, ..."

For their part, JRC/Thurman sought a ruling that JRC's rescission of the Agreement was proper. They also sought recovery against PDS, Crozier and Traylor for damages incurred in securing substitute computer systems.

The arbitration hearing was conducted on July 26 and July 27, 2000. At the hearing, PDS and its principals sought no compensatory damages of any kind other than unpaid

software license fees and "nominal" damages purportedly due for breach of a confidentiality covenant. PDS' damages were itemized on its Joint Exhibit 125. (L-9). At the conclusion of the hearing, PDS revised its itemization. (L-10). The Revised Joint Exhibit 125 deleted PDS' request for "nominal" damages and maintained its prayer for accelerated software license fees totaling $138,125, plus interest thereon of $19,549.42. (*Id.*)

As to these license fees, JRC presented the arbitrator with legal authority showing that, under Georgia law, such accelerated fees constituted a "penalty" and were "void" as a matter of law. O.C.G.A. § 11-2-718(1).

On August 18, 2000, the arbitrator entered an Award in favor of PDS, Crozier and Traylor. (App. F). The Award included compensatory damages of $81,540, attorneys' fees of $64,875, administrative fees and expenses of $2,487.01, and an amount of $1,782.99 for the compensation and expenses of the arbitrator. (*Id.*) The compensatory damages awarded did not correspond to any damages identified or requested by PDS at the hearing. Neither JRC/Thurman nor PDS understood on what basis they had been calculated. As for the specific damages that PDS had requested, the arbitrator concluded that "[t]he acceleration clause on the contract was a penalty and unreasonable before, during and after the execution of the contract." (App. E, p. 29a).

With his ruling, the arbitrator demonstrated on the face of the record that he understood the applicability of the legal authority rendering the Agreement's accelerated damages void. Yet, the arbitrator proceeded to award such damages anyway, albeit less than what had been sought.

PDS and its principals filed an Application with the trial court seeking to confirm the Award. (L-33).

This Application, like PDS's earlier motion to compel arbitration (L-11, at L-12), explicitly referenced the fact that "The Federal Arbitration Act governs the arbitration agreement between the parties to this transaction, as the transaction involves interstate commerce." (L-33, at L-35) Those factors demonstrating interstate commerce in connection with the making and performance of the parties' Agreement were evidenced by an affidavit given by PDS principal Thomas G. Traylor. (L-30) (*see also* L-40, at L-44, wherein PDS and its principals affirmatively noted, "Defendants have previously demonstrated that the contract between the parties involved interstate commerce and as such the FAA is the applicable source of law.")

JRC and Thurman not only opposed confirmation of the Award but formally asked the trial court to vacate and/or modify it. JRC/Thurman contended that the Award represented an overstepping by the arbitrator of his authority.

On February 12, 2001, the trial court entered an order confirming the arbitration Award. (App. D). Simultaneously therewith, the trial court entered a Final Judgment in favor of PDS, Crozier and Traylor for all amounts specified in the Award. (App. E).

JRC/Thurman appealed the trial court's judgment to the Court Of Appeals of Georgia. In their appeal, JRC/Thurman contended, *inter alia*, the trial court had erred in confirming the Award and in not vacating or modifying it by reason of the fact the arbitrator had overstepped his authority and, in so doing, had manifestly disregarded the law. Authorities supporting this conclusion were presented under both the FAA and the Georgia Arbitration Code ("GAC").

The arbitrator had "manifestly disregarded the law," contended JRC/Thurman, by awarding compensatory damages he had ruled to be an unreasonable penalty and therefore "void." (App. F). Indeed, the *only* compensatory damages reflected on PDS's final itemization of damages – Revised Joint Exhibit 125 – were those pertaining to accelerated software license fees. (L-10). The arbitrator's award of those illegal damages, albeit at a reduced amount, constituted a manifest disregard of the law, contended JRC/ Thurman.

On July 31, 2001, the Court Of Appeals reversed the trial court's judgment and order confirming the Award. (App. C, p. 13a) The Court of Appeals agreed that the arbitrator had overstepped his authority and "manifestly disregarded the law, regarding penalties, which he expressly recognized by identifying the damages as a penalty and not liquidated damages; thus, he did not merely erroneously interpret the law. *See Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997)." (App. C, p. 20a)

PDS then filed a petition for certiorari to the Supreme Court of Georgia. JRC/Thurman opposed the petition, presenting authorities to demonstrate that the "manifest disregard of the law" standard was a recognized nonstatutory ground of judicial review under the FAA. (L-59, at L-80 - L-84). A writ of certiorari was granted. In its order granting the writ, the Supreme Court of Georgia announced that it was "particularly concerned [with] . . . [w]hether a reviewing court may properly vacate an arbitration award due to the arbitrator's manifest disregard of the law."

Following briefing, in which PDS's repeated insistence that the FAA explicitly governed this matter was made abundantly clear, (L-94, at L-120), the Supreme Court of Georgia answered its question in the negative. It concluded that a reviewing court could not properly vacate an arbitration award due to the arbitrator's manifest disregard of the law. (App. B, p. 2a)

Because federal arbitration law closely mirrored the statutory grounds set forth in the GAC, the Supreme Court of Georgia elected to examine federal authorities in reaching its decision. It noted that the "manifest disregard of the law" principle was "widely recognized as being nothing more than a non-statutory creation of the federal courts." (*Id.*, at p. 5a.). Because Georgia's legislature had set forth four statutory grounds for vacating an arbitration award, and did not include "manifest disregard of the law" among them, the Supreme Court of Georgia concluded that, "whatever the merits of the 'manifest disregard of the law' principle, we should not be so bold as to *judicially* mandate its use as an additional ground for vacatur. . . ." (emphasis is the Court's) (*Id.*) The Court offered no explanation for ruling as it did in light of PDS' repeated assertions before the trial court that the FAA, not the GAC, governed the Award.

A forceful dissenting opinion was filed by Justice George Carley, joined by Justice Carol Hunstein. The dissent contended that a holding preventing courts from vacating arbitration awards:

> on the basis of the arbitrator's "manifest disregard of the law" has the effect of rendering judicial review a meaningless exercise. If the majority is correct, then an arbitrator is free to ignore the law

willfully, as the deliberate refusal to adhere to it will not prevent enforcement of the admittedly illegal award. Although judicial scrutiny of arbitration awards necessarily is limited, I believe that it nevertheless must be " 'sufficient to ensure that arbitrators comply with the requirements of the statute' at issue. [Cit.]" *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 32, 114 L. Ed. 2d 26, 111 S. Ct. 1647(III)(B), fn. 4 (500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26) (1991) (applying federal law). The courts "are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and requirements of the statutes." *Williams v. Cigna Financial Advisors*, 197 F.3d 752, 761(II) (5th Cir. 1999) (applying federal law). Thus, based upon a reading of O.C.G.A. § 9-9-13(b) as a whole, I submit that that statute implicitly vests the judiciary with the authority to vacate an arbitration award based upon an arbitrator's "manifest disregard of the law."

REASONS FOR GRANTING THE PETITION

1. Because Virtually Every Federal Circuit Court Of Appeals Now Recognizes The Nonstatutory Ground Of "Manifest Disregard Of The Law" As A Valid Basis Of Judicial Review For Arbitration Awards Decided Pursuant To The Federal Arbitration Act, This Court Should Make Clear That State Court Jurists Cannot Decline To Vacate Arbitration Awards On Such Ground When The Federal Act Pertains.

While a general consensus has existed among the United States Courts of Appeal that the scope of judicial review concerning arbitration awards should be narrow, there has previously existed disagreement among them whether the statutory grounds for vacatur set out in Section 10(a) of the FAA could be augmented by judicially fashioned standards of review. *See* Hayford, Stephen L., "Law In Disarray: Judicial Standards For Vacatur Of Commercial Arbitration Awards," 30 Ga. L. Rev. 731, Spring 1996. Today, however, virtually all federal circuit courts refer to nonstatutory grounds and do not limit their review of commercial arbitration awards to a strict reading of section 10(a) of the Federal Arbitration Act ("FAA"). *See Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010 (10th Cir. 1994) (" 'Federal courts have never limited their scope of review [of arbitration awards] to a strict reading of 9 U.S.C. section 10].' " (alterations in original) (quoting *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 633 (10th Cir. 1988))). Their view reflects the belief that although "considerable deference" is due a commercial arbitrator's decision under section 10(a), such deference "does not grant carte blanche approval to any decision that an arbitrator might

make." *International Bhd. Of Firemen, Local 261 v. Great N. Paper Co.*, 765 F.2d 295, 296 (1st Cir. 1985) (labor arbitration case), quoted in *Challenger Caribbean Corp. v. Union Gen. De Trabajadores de Puerto Rico*, 903 F.2d 857, 861 (1st Cir. 1990) (labor arbitration case), and quoted in *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990).

The seminal nonstatutory ground under the FAA is "manifest disregard of the law." Hayford, *supra* at 731. The standard originates from dictum appearing in a United States Supreme Court decision, *Wilko v. Swan*, 346 U.S. 427, 436, 74 S. Ct. 182, 98 L. Ed. 168 (1953), overruled by *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 485 (III), 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). Relevant portions of the full paragraph from which the dictum in *Wilko v. Swan* is cited follows below:

> While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of [applicable law] would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. . . . The interpretations of the law by the arbitrators, ***in contrast to manifest disregard [of the law]***, are not subject, in the federal courts, to judicial review for error in interpretation.

Wilko v. Swan, 346 U.S. at 436. (Emphasis supplied).

This Court has not further discussed the meaning and significance of this dictum in the 47 years following its decision in *Wilko*. Indeed, since 1953, the Supreme Court has made but three collateral references to the "manifest

disregard" of the law standard. In a dissent published in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985), Justice Stevens noted that "arbitration awards are reviewable for manifest disregard of the law." In a partially concurring opinion in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 102 S. Ct. 2332, 96 L. Ed. 2d 185 (1987), Justice Blackmun referred to the "manifest disregard" standard of *Wilko* but provided no substantive discussion of it. While *Wilko* was overruled in *Rodriguez de Quijas v. Shearson/American Express*, *supra*, the Court did not in that opinion address its "manifest disregard" dictum.

Courts that recognize the manifest disregard of law standard define it as necessarily meaning "more than error or misunderstanding with respect to law." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). Manifest disregard "may be found 'when arbitrators understand and correctly state the law, but proceed to disregard the same.' " *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2249, 90 L. Ed. 2d 695 (1986).

In the Eleventh Circuit, the word "manifest" means "evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident." *Black's Law Dictionary*, 962 (6th ed. 1990), cited with approval in *Montes*, *supra*. The word "disregard," alternatively, means "to treat as unworthy of regard or notice; to take no notice of; to leave out of consideration; to ignore; to overlook; to fail to observe." *Black's Law Dictionary* at 472; *see also American Heritage Dictionary* at 381 ("To pay no attention or heed to; fail to consider; ignore.").

"If a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it." *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742 (11th Cir. 1988). "An arbitration panel that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it." *Montes*, 128 F.3d at 1461, citing *O.R. Sec.*, 857 F.2d at 747. The court must be able to see that the arbitrator "appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. [Cit.]" *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). "We conclude that a manifest disregard for the law, in contrast to a misinterpretation, misstatement or misapplication of the law, can constitute grounds to vacate an arbitration decision." *Montes*, *supra*, at 1461-1462.

Today, virtually every circuit court of appeal recognizes the "manifest disregard of the law" standard. *See Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234 (1st Cir. 1995); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9 (2d Cir. 1997); *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376 (3d Cir. 1995); *Upshur Corp. v. Erwin Behr GmbH. & Co., KG*, 87 F.3d 844 (6th Cir. 1996); *National Wrecking Co. v. International Broth. Of Teamsters, Local 731*, 990 F.2d 957 (7th Cir. 1993); *Lee v. Chica*, 983 F.2d 883 (8th Cir.), *cert. denied*, 510 U.S. 906, 114 S. Ct. 287, 126 L. Ed. 2d 237 (1993); *Barnes v. Logan*, 122 F.3d 820 (9th Cir. 1997); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631 (10th Cir. 1988); *McIlroy v.*

PaineWebber, Inc., 989 F.2d 817, 820 n.2 (5th Cir. 1993); *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456 (11th Cir. 1997).

Furthermore, the Second Circuit Court of Appeals has held that "when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account." *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034, 143 L. Ed. 2d 378, 119 S. Ct. 1286 (1999). In the case of *Rotfeld v. Boenning & Scattergood, Inc., et al.*, 1991 U.S. Dist. LEXIS 11618 (E.D. Pa. August 20, 1991), the United States District Court for the Eastern District of Pennsylvania, in reviewing an award under the Federal Act, held that "where an arbitrator's award was arrived at through a series of undisclosed calculations, a court has discretion to inquire into the basis of the award if the facts of the case fail to support it or if it appears to be in manifest disregard of the law." The defendants in *Rotfeld* argued that it was beyond the court's scope of review to question the merits of an award. The district court stated that it agreed with this contention but went on to note that it was not beyond the court's scope of review to question the calculation of the award. As to the defendants' assertion that the arbitrator was free to arrive at a compromise verdict, the district court found the defendants to be relying improperly on case authority having to do with claims for negligence, where compromise damage awards are customary. Contract claims, said the district court, "rely instead on objective mathematical calculation to insure that the injured party is restored to the financial position he would have been in had the breach never occurred." For that reason, and because the arbitrators had provided no explanation for their award, the award was vacated by the district court.

The same situation pertains here. The arbitrator's Award was delivered without benefit of explanation. It not only is incapable of being understood, it fails to restore the supposedly injured party to the financial position that it would have been in had no breach ever occurred. Respondents instead have been unjustly enriched.

This Court should act to insure that state court jurists do not decline review merely because the statutory schemes in their respective jurisdictions do not explicitly recognize "manifest disregard of the law" as a basis for judicial review. Where, as here, interstate commerce is implicated, and where, as here, the party seeking arbitration moves to compel such proceedings pursuant to the FAA, state court jurists must review arbitration awards subsequently entered in conformance with standards of judicial review explicitly applicable to the FAA.

2. Because Arbitration Is An Increasingly Pervasive Reality Of Modern Commercial Life, This Court Should Act To Insure That Important Substantive Rights Are Not Lost Amidst The Move From Judicial To Arbitral Forums.

Arbitration is no longer the exclusive province of parties engaged in arms length negotiations. Each day Americans are required to "choose" arbitration if they wish to commence or continue employment, open a securities brokerage account, or do business with selected business vendors. Arbitration agreements have now received near universal approval. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27, 105 S. Ct. 3346, 3354, 87 L. Ed. 2d 444 (1985). As a consequence, employers,

brokerage houses and retailers are employing it to avoid the cost and risks of litigation.

Fueling this movement are court decisions consistently holding that claims arising under federal statutes may become the subject of arbitration agreements. (*Id.* at 628). Arbitration agreements encompassing claims brought under federal employment discrimination statutes, for example, have received near universal approval.

The Eleventh Circuit Court of Appeals, in keeping with the reasoning of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), has found that Title VII claims may also be subject to compulsory arbitration. *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992). Almost every other circuit concurs with the Eleventh Circuit's decision in *Bender* that Title VII does not prohibit mandatory arbitration for claims arising under the statute. *See, e.g., Desiderio v. National Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 204-06 (2d Cir. 1999), *cert. denied*, 531 U.S. 1069, 121 S. Ct. 756, 148 L. Ed. 2d 659 (2001); *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 (1st Cir. 1999); *Koveleskie v. SBC Capital Mrkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999), *cert. denied*, 528 U.S. 811, 120 S. Ct. 44, 145 L. Ed. 2d 40 (1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139, 119 S. Ct. 1028, 143 L. Ed. 2d 38 (1999), *abrogated on other grounds, Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996), *cert. denied*,

519 U.S. 980, 117 S. Ct. 432, 136 L. Ed. 2d 330 (1996); *Metz v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

In *Circuit City v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001), this Court ruled that the Federal Arbitration Act is applicable to all contracts of employment excepting only those involving transportation workers.

The expanding range and number of disputes to be resolved through arbitration means that reviewing courts must diligently insure that important substantive rights are not lost. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, *supra* at 628. This legal guarantee will become increasingly uncertain should arbitrators understand they may knowingly defy the law. In the absence of vigilant judicial review, public respect and support for the arbitration process will surely erode.

"Manifest disregard of the law" gives meaning to the entire concept of judicial review. The principle is a necessary component of the courts' "obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes." *Williams v. Cigna Financial Advisors*, 197 F.3d 752, 761 (5th Cir. 1999). Its vitality is so essential that this Court was moved to declare, in the case of *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (II), 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1985),

that "manifest disregard of the law" is one of the "very unusual circumstances" giving rise to a vacatur of an arbitration award by a federal court.

Broadly accepted by state and federal courts, eminently compatible with our English and American common law traditions, and resonating with what every man, woman and child believes a *legal* system is meant to guarantee, "manifest disregard of the law" should never be refused by state court jurists as a standard of review when proceedings brought under the FAA are involved.

CONCLUSION

A writ of certiorari should issue to address the legal and policy issues presented above.

Dated: December 16, 2002.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED SEPTEMBER 16, 2002

SUPREME COURT OF GEORGIA

Atlanta, September 16, 2002

Case No. S01G1765

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

PROGRESSIVE DATA SYSTEMS, INC., et al.

v.

JEFFERSON RANDOLPH CORPORATION,
d/b/a JRC TRUCKING, INC., et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein and Carley, JJ., who dissent.

APPENDIX B — OPINION OF THE SUPREME COURT OF GEORGIA DATED AND DECIDED JULY 15, 2002

SUPREME COURT OF GEORGIA

S01G1765.

PROGRESSIVE DATA SYSTEMS, INC., et al.

v.

JEFFERSON RANDOLPH CORPORATION, d/b/a JRC TRUCKING, INC., et al.

July 15, 2002, Decided

OPINION

THOMPSON, Justice.

We granted a writ of certiorari to the Court of Appeals in *Jefferson Randolph Corp. v. Progressive Data Systems*, 251 Ga. App. 1 (553 S.E.2d 304) (2001), to determine whether an arbitration award can be vacated because of the arbitrator's "manifest disregard of the law." The answer is "no."

Progressive Data Systems ("PDS") sold computer equipment and software to Jefferson Randolph Corp. ("JRC"). After the equipment was delivered, JRC sued to rescind the sales agreement and for fraud. PDS sought arbitration and counterclaimed for unpaid software licensing fees and future fees. The arbitrator entered an award on PDS's counterclaim for compensatory damages in the amount of $81,540, plus attorney fees, administrative fees and expenses. The trial

court confirmed the award and added "post-award pre-judgment interest" and "additional attorney fees" to it. JRC appealed and the Court of Appeals, reversed, holding, inter alia, that the arbitrator manifestly disregarded the law because, although he recognized that damages for future license fees are to be treated as liquidated damages and an unenforceable penalty, he awarded damages anyway.

In *Greene v. Hundley*, 266 Ga. 592 (468 S.E.2d 350) (1996), this Court ruled that the four statutory grounds for vacating an arbitration award are exclusive. That is to say that to vacate an award of arbitration, the applying party must show that its rights were prejudiced by: (1) Corruption, fraud, or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping of the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or (4) A failure to follow the procedure of this [Code], unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.

O.C.G.A. § 9-9-13(b).

Thus, under *Greene*, an arbitration award can be vacated in *only* one of four statutory ways. See *Ralston v. City of Dahlonega*, 236 Ga. App. 386 (512 S.E.2d 300) (1999) (review must be confined to the four statutory grounds). That is because the Georgia Arbitration Code is in derogation of the common law and must be strictly construed. *Greene*, *supra* at 594.

Appendix B

Inasmuch as the Code does not list "manifest disregard of the law" as a ground for vacating an arbitration award, it cannot be used as an additional ground for vacatur. Nor can it be said that a "manifest disregard of the law" fits within the framework of the third statutory ground listed above — overstepping of the arbitrator's authority. That ground only comes into play when an arbitrator determines matters beyond the scope of the case. *Threatt v. Forsyth County*, 250 Ga. App. 838, 841 (552 S.E.2d 123) (2001) (citing *Haddon v. Shaheen & Co.*, 231 Ga. App. 596 (499 S.E.2d 693) (1998)). It is not applicable where, as here, the issue to be decided, i.e., damages, is properly before the arbitrator.

Because the federal arbitration law closely mirrors the statutory grounds set forth in our Arbitration Code, we examine its provisions.[1] We note that the federal law provides several statutory grounds for vacating an arbitration award and that "manifest disregard of the law" is not one of them. Nevertheless, the federal courts cite "manifest disregard of the law" as a ground for vacatur. See, e.g., *NCR Corp. v. Sac-Co.*, 43 F.3d 1076, 1079 (6th Cir. 1995).

In the main, the federal courts do not rely upon the provisions of the federal arbitration statute to justify using the "manifest disregard of the law" principle. To the contrary,

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1. The federal law allows a court to vacate an arbitration award where the award was procured by "corruption" or "fraud"; where the arbitrators demonstrated "partiality"; "where the arbitrators were guilty of misconduct" or "other misbehavior" causing prejudice to the rights of any party; "where the arbitrators exceeded their powers" in such a way "that a mutual, final, and definite award upon the subject matter submitted was not made." 9 USCA § 10(a).

that principle is widely recognized as being nothing more than a non-statutory creation of the federal courts. See *Carte Blanche (Singapore) v. Carte Blanche (Intl.)*, 888 F.2d 260, 265 (2nd Cir. 1989) ("manifest disregard of the law" is a judicially created ground for vacatur of an arbitration award; it is not to be found in the federal arbitration law).

Our legislature set forth four statutory grounds for vacating an arbitration award. Significantly, it did not include "manifest disregard of the law" as one of those grounds. Whatever the merits of the "manifest disregard of the law" principle, we should not be so bold as to *judicially* mandate its use as an additional ground for vacatur, especially since, as noted above, our Arbitration Code is in derogation of the common law and must be strictly construed.

Judgment reversed. All the Justices concur, except Hunstein and Carley, JJ., who dissent.

Appendix B

CARLEY, Justice, dissenting.

"[A]n arbitration award may be vacated only if one or more of the four statutory grounds set forth in [O.C.G.A.] § 9-9-13(b) is found to exist." *Greene v. Hundley*, 266 Ga. 592 (468 S.E.2d 350) (1996). I strongly believe that the grounds set forth in that statute implicitly incorporate the concept of "manifest disregard of the law." Moreover, even if we were to construe O.C.G.A. § 9-9-13(b) as not including that principle, I submit that "manifest disregard of the law" still constitutes a valid basis for vacating an arbitration award because, under such a construction, the holding in *Greene* would be unduly restrictive. Therefore, I respectfully dissent.

1. While, the words "manifest disregard of the law" do not appear in O.C.G.A. § 9-9-13(b), "a statute is to be read as a whole, and the spirit and intent of the legislation prevails over a literal reading of the language. [Cit.]" *Kemp v. City of Claxton*, 269 Ga. 173, 175(1) (496 S.E.2d 712) (1998). The phrase has a simple and well-defined meaning: "To manifestly disregard the law, one must be conscious of the law and deliberately ignore it. [Cit.]" *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461 (11th Cir. 1997) (applying federal law). As thus construed, the ground is "is a narrow one." *Montes v. Shearson Lehman Bros.*, *supra* at 1462.

There must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did. [Cits.]

Appendix B

Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1267(C) (7th Cir. 1992) (applying federal law). Therefore, "[a]n arbitration board that incorrectly interprets the law has not manifestly disregarded it." *Montes v. Shearson Lehman Bros.*, *supra* at 1461. "[T]he term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. [Cit.]" *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (applying federal law).

When faced with questions of law, an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.

Merrill Lynch, Pierce, Fenner & Smith v. Jaros, 70 F.3d 418, 421(III) (6th Cir. 1995) (applying federal law). Thus, "manifest disregard of the law" is an applicable ground for vacating an award only in the limited instance "where it is clear from the record that the arbitrator recognized the applicable law — and then ignored it. [Cits.]" *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990) (applying federal law).

Under O.C.G.A. § 9-9-13(b)(1), an arbitration award can be vacated for "misconduct in procuring the award" and, under subsection (b)(2), for the "[p]artiality of an arbitrator. . . ." In my opinion, in the very rare instance where an arbitrator intentionally ignores a controlling legal principle, he or she lacks the requisite impartiality and engages in such misconduct as to authorize vacation of the

award. See *San Martine Compania De Navegacion v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) (applying federal law). In addition, subsection (b)(3) of the statute provides that "[a]n overstepping by the arbitrators of their authority" is a ground for vacation of the award. I simply do not believe that an arbitrator may refuse purposefully to follow the applicable law. "When a claim arises under specific laws, . . . the arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so." (Emphasis supplied.) *Montes v. Shearson Lehman Bros.*, *supra* at 1459. Therefore, an arbitrator who intentionally elects not to be bound by controlling legal principles must necessarily overstep his or her legitimate authority. See *Metal Products Workers Union, Local 1645 v. The Torrington Co.*, 242 F.Supp. 813, 820 (D. Conn. 1965) (applying federal law), aff'd, 358 F.2d 103 (2d Cir. 1966).

A holding that the courts cannot vacate an arbitration award on the basis of the arbitrator's "manifest disregard of the law" has the effect of rendering judicial review a meaningless exercise. If the majority is correct, then an arbitrator is free to ignore the law willfully, as the deliberate refusal to adhere to it will not prevent enforcement of the admittedly illegal award. Although judicial scrutiny of arbitration awards necessarily is limited, I believe that it nevertheless must be " 'sufficient to ensure that arbitrators comply with the requirements of the statute' at issue. [Cit.]" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32, 114 L. Ed. 2d 26, 111 S. Ct. 1647(III)(B), fn. 4 (500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26) (1991) (applying federal law). The courts "are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their

duties and the requirements of the statutes." *Williams v. Cigna Financial Advisors*, 197 F.3d 752, 761(II) (5th Cir. 1999) (applying federal law). Thus, based upon a reading of O.C.G.A. § 9-9-13(b) as whole, I submit that that statute implicitly invests the judiciary with the authority to vacate an arbitration award based upon an arbitrator's "manifest disregard of the law."

2. However, even assuming that that principle is not encompassed within O.C.G.A. § 9-9-13(b), I still believe that the result the Court reaches today is incorrect. *Greene* did not involve the "manifest disregard of the law" concept and dealt only with the issue of whether the judiciary is authorized to vacate an arbitration award due to a lack of evidentiary support. This Court answered that question in the negative, correctly concluding that arbitration is not "subject to traditional rules of appellate review." *Greene v. Hundley*, *supra* at 597(3). This holding in *Greene* that a lack of evidence is a traditional ground of judicial scrutiny which is inapplicable to review of an arbitration award is entirely consistent with the "reluctance [of the judiciary] to suggest explicitly or implicitly that an arbitration board's decision can be reviewed on the basis that its conclusion or reasoning is legally erroneous." *Montes v. Shearson Lehman Bros.*, *supra* at 1461. However, that reluctance should not extend to a review based upon a "manifest disregard of the law," because "[t]he courts which have recognized the manifest disregard of the law standard define it as necessarily meaning 'more than error or misunderstanding with respect to law.' [Cit.]" *O.R. Securities v. Professional Planning Assoc.*, 857 F.2d 742, 747 (11th Cir. 1988) (applying federal law). Yet, the statement in *Greene* that the bases set forth in O.C.G.A.

§ 9-9-13(b) are the exclusive grounds for vacating an arbitration award seemingly forecloses any consideration of the possibility that "manifest disregard of the law" is a valid non-statutory ground. In my opinion, *Greene's* unqualified restriction of the authority of the judiciary to review arbitration awards was unnecessary. I believe that we should have limited our holding in *Greene* to the rejection of the lack of evidentiary support as a permissible ground, and left the question of the validity of other non-statutory grounds, such as "manifest disregard of the law," for a case in which that issue was presented squarely. The present appeal is the first case in which this Court has focused on the concept of "manifest disregard of the law," and I cannot concur in a refusal to consider the viability of that ground based upon the unnecessary statement in *Greene* that there are no permissible non-statutory bases for vacating an arbitration award.

The "manifest disregard of the law" principle stems from the decision of the Supreme Court of the United States in *Wilko v. Swan*, 346 U.S. 427, 436 (74 S. Ct. 182, 98 L. Ed. 168) (1953), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 485(III) (109 S. Ct. 1917, 104 L. Ed. 2d 526) (1989), indicating that, although the arbitrator's erroneous interpretation of the law would not subject an award to reversal, his or her clear disregard of the law would. See also *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942(II) (115 S.Ct. 1920, 131 L. Ed. 2d 985) (1995) (holding that "manifest disregard of the law" is one of the "very unusual circumstances" in which a federal court can set aside an arbitration award). Since then, it appears that all of the "numbered federal circuit courts and the D.C.

Circuit have recognized manifest disregard of the law as either an implicit or nonstatutory ground for vacatur under the FAA [(Federal Arbitration Act)]. [Cit.]" *Williams v. Cigna Financial Advisors*, *supra* at 759(II). See also *Montes v. Shearson Lehman Bros.*, *supra* at 1460. Thus, today "most state and federal courts recognize[ ] one or more nonstatutory grounds warranting vacatur of an arbitral award, including . . . the arbitrator's manifest disregard of the law. . . ." *Williams v. Cigna Financial Advisors*, *supra* at 757(II).

The rationale for this almost universal acceptance of the "manifest disregard of the law" principle is that it is deemed a necessary component of the courts' "obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes." *Williams v. Cigna Financial Advisors*, *supra* at 761 (II). "A primary advantage of arbitration is the expeditious and final resolution of disputes by means that circumvent the time and expense associated with civil litigation." *Greene v. Hundley*, *supra* at 597(3). However, that advantage is surely lost if the judiciary permits arbitrators to circumvent the applicable law wilfully. No reasonable potential litigant would select arbitration in lieu of a lawsuit if there is a possibility that the dispute will be resolved by a final award issued by an arbitrator who has judicial approval to ignore controlling legal principles. Therefore, to the extent that *Greene* bars acceptance of a "manifest disregard of the law" as a valid ground for vacating an award, it discourages arbitration as an alternate method of dispute resolution and places Georgia outside the mainstream of persuasive authority. Accordingly, I would overrule the holding in *Greene* that O.C.G.A. § 9-9-13(b) provides the exclusive grounds for vacating an arbitration award, and

adopt "manifest disregard of the law" as a viable basis for doing so. Thus, the judgment of the Court of Appeals should be affirmed.

I am authorized to state that Justice Hunstein joins in this dissent.

APPENDIX C — OPINION OF THE COURT OF APPEALS OF GEORGIA DATED AND DECIDED JULY 31, 2001

COURT OF APPEALS OF GEORGIA

A01A1590.

JEFFERSON RANDOLPH CORPORATION et al.

v.

PROGRESSIVE DATA SYSTEMS, INC. et al.

July 31, 2001, Decided

OPINION

ELDRIDGE, Judge.

This is an appeal from the confirmation of an arbitration award made by the American Arbitration Association ("AAA") against Jefferson Randolph Corporation d/b/a JRC Trucking, Inc. and Thurman Carpets, Inc., plaintiffs, for Progressive Data Systems, Inc., William A. Crozier, Jr., and Thomas G. Taylor, defendants, based on their counterclaims. Plaintiffs contend that the trial court erred in confirming an award when the arbitrator overstepped his authority and entered an award on issues not submitted to him, granted O.C.G.A. § 9-15-14 attorney fees without identifying conduct authorizing the award, awarded postjudgment interest at 18 percent on the entire principal, and awarded prejudgment interest on the principal arbitrator's award. We agree and reverse.

Appendix C

Jefferson Randolph Corporation d/b/a JRC Trucking ("JRC") is in the business of hauling carpet inventory for carpet manufacturers but also sold carpet products through its sister corporation Thurman Carpets ("Thurman"). On May 24, 1996, under an Equipment Sales, Software License, and Service Agreement, JRC bought computer software and hardware from Progressive Data Systems ("PDS") for $167,935.26, which it paid in full, to track the movement of its trucks with inventory and to process the various carpet transactions in which Thurman was involved. The basic software deliverable had a distribution modification that required customization to perform order entry, inventory, and purchasing; however, 15 months after the Agreement was entered into, PDS had not delivered a completed distribution modification under the contract.

JRC came to believe that Crozier and Taylor, principals of PDS, had made false and untrue representations concerning the work that they would perform as to timely performance, contract services, and features. JRC gave notice of its rescinding the Agreement.

On April 22, 1999, JRC sued to rescind the Agreement and for fraud. The defendants answered, counterclaimed, filed a motion to dismiss for failure to have an indispensable party, Thurman, and moved to stay and compel arbitration under the contract under the Federal Arbitration Act. JRC added Thurman as an additional plaintiff.

Initially, JRC opposed arbitration, because Thurman, Crozier, and Taylor were not parties to the Agreement requiring arbitration and were not bound to arbitrate. Subsequently,

JRC and the other parties agreed to arbitration, but the parties could not agree upon the issues to submit to arbitration. On December 8, 1999, the trial court ordered the parties to proceed to arbitration "pursuant to the terms of the arbitration provisions included in the contract between the parties." PDS initiated a demand for arbitration before the AAA.

On July 26 and 27, 2000, at the arbitration hearing, PDS made claims only for the unpaid software license fees and all future licensing fees as liquidated damages, prejudgment interest at the rate of 1.5 percent per month on the accelerated future licensing fees, and expenses of litigation. At the direction of the arbitrator, PDS revised and sought additional damages. JRC and Thurman sought rescission of the Agreement and recovery of consequential damages. PDS never terminated the Agreement nor sent JRC an invoice and demand for the accelerated future invoice payments for eighteen years and three months as liquidated damages.

On August 18, 2000, the arbitrator entered an award against JRC and Thurman and for the defendants on their counterclaims in the amount of $81,540 in compensatory damages, which did not disclose what were consequential damages and prejudgment interest; $64,875 in attorney fees; $2,487 in administrative fees and expenses; and $1,782.99 in expenses and compensation of the arbitrator totaling $150,685. The attorney fees were not differentiated as to what was incurred to collect the future license fees, what had been incurred in defense to plaintiffs' case, and what was reasonable for prosecuting the counter-claim.

PDS moved for the trial court to confirm the award. The plaintiffs moved to vacate or modify the award, because the arbitrator exceeded his authority and made an award as to issues not submitted to him. On February 12, 2001, the trial court confirmed the award. On the same date, the trial court entered a final judgment for such award and further awarded the defendants on their counterclaim "post-award prejudgment interest" in the amount of $12,261.22 on the gross sum of $150,685 and "additional attorney's fees" of $5,000 without any findings of fact or conclusions of law or any hearing, and postjudgment interest on $150,685 at 18 percent per year.

1. Plaintiffs contend that the trial court erred in confirming the arbitrator's award, because he "overstepped his authority." We agree.

Under Section 3.15 of the Agreement, PDS was entitled to damages:

> Upon the occurrence of an Event of Default, Vendor may (1) terminate this Agreement and invoke all rights Vendor possesses upon termination and (2) if Customer remains liable for any monetary obligation created under this Agreement, accelerate and declare all obligations of Customer as a liquidated sum and proceed against Customer in any lawful way for satisfaction of such sum, or repossess as much of the System as remains in Customer's possession.

Prior to suit, PDS never terminated the Agreement, which would have been a useless act, because JRC had already given

notice of the rescission of the Agreement and ceased to use the system. However, JRC had fully paid $167,935.26, the cost of the system, as well as the $7,500 a year licensing fee; on January 8, 1998, after termination of the Agreement, JRC ceased to pay the annual fees owed under the contract for eighteen years and three months, which PDS sought as compensatory damages in its counterclaim. PDS never sent JRC an invoice or demand to pay the accelerated future license fees for eighteen years and three months prior to suit. From the time of the termination notice until the time of the arbitrator's award, approximately 27 months of license fees had been unpaid and 16 future years of license fees had not accrued, absent an acceleration of the obligation as liquidated damages. By PDS' claim for damages, it sought $7,500 as nominal damages under the breach of confidentiality provision. The rest of PDS' damages were claims for the liquidated damages of $136,875, prejudgment interest of 1.5 percent per month, and attorney fees.

The arbitrator correctly found in his award that the liquidated damages provision of Section 3.15 was a penalty under O.C.G.A. § 11-2-718, regarding liquidated damages; plaintiffs brought this Code section to the arbitrator's attention prior to the award. The $7,500 for breach of confidentiality as nominal damages would have been appropriate damages in the absence of consequential damages. O.C.G.A. § 13-6-6; *Crawford & Assoc. v. Groves-Keen, Inc.*, 127 Ga. App. 646, 650(1) (194 S.E.2d 499) (1972). However, nominal damages are not recoverable when the claimant seeks and recovers special damages, as well as nominal damages. See *Bennett v. Associated Food Stores*, 118 Ga. App. 711, 716(2) (165 S.E.2d 581) (1968). The only

other contract damages that were owed at the time of the award were license fees for the 27 months at $7,500 a year plus prejudgment interest. Therefore, contract damages of $81,540 are unsupported by any evidence and must be in whole or in part attributable to liquidated damages for the future licensing fees, as well as prejudgment interest on an alleged commercial account that constituted accelerated future lost income.

(a) In this case, the arbitrator, by denominating the acceleration of future license fees as a penalty rather than recoverable liquidated damages, correctly recognized that, under Georgia law and public policy, liquidated damages are a penalty to deter a breach of contract, where the liquidated damages are unreasonable and there is no difficulty ascertaining future damages. O.C.G.A. §§ 11-2-718(1); 13-6-7; *AFLAC, Inc. v. Williams*, 264 Ga. 351, 354(2) (444 S.E.2d 314) (1994); *Carter v. Tokai Financial Svcs.*, 231 Ga. App. 755, 758-759(2) (500 S.E.2d 638) (1998). For a liquidated damages clause to be enforceable in Georgia, such damages must demonstrate: (1) that the injury caused by the breach must be difficult or impossible of estimation; (2) that the parties must intend to provide for damages; and (3) that the sum stipulated must be a reasonable pre-estimate of the probable loss. *Southeastern Land Fund v. Real Estate World*, 237 Ga. 227, 230 (227 S.E.2d 340) (1976); *Oasis Goodtime Emporium I, Inc. v. Cambridge Capital Group, Inc.*, 234 Ga. App. 641 (507 S.E.2d 823) (1998); *Wehunt v. ITT Bus. Communications Corp.*, 183 Ga. App. 560 (359 S.E.2d 383) (1987). Where, as here, both liquidated and other damages are recoverable under the Agreement, the liquidated damages are an unenforceable penalty. *Southeastern Land Fund v. Real*

Estate World, *supra* at 228. As in this case, where half of a long-term retainer fee is treated as liquidated damages, such provision is unenforceable as a penalty to deter termination. *AFLAC, Inc. v. Williams*, *supra* at 354. Here, the liquidated damages are all the future license fees without reduction for expenses or for present cash value and interest imposed as if it were a past due debt instead of accelerated future fees, not yet earned. Future economic loss of earnings must be reduced to present cash value, since the fees have not been earned. See generally O.C.G.A. § 51-12-13; *Chouinard v. City of East Point*, 237 Ga. App. 266, 270(5)(b) (514 S.E.2d 220) (1999); *Crosby v. Spencer*, 207 Ga. App. 487, 488(2) (428 S.E.2d 607) (1993). If liquidated damages are recoverable, then the parties cannot elect between liquidated and actual damages; prejudgment interest would be actual damages. O.C.G.A. §§ 7-4-16; 13-6-13; *Southeastern Land Fund v. Real Estate World*, *supra* at 230. Where there is a loss of future business earnings, this is a recovery for lost future profits after the projected expenses of earning the projected revenue has been deducted and not the recovery of the gross revenue collected, because the claimant is not permitted to recover expenses never incurred, putting him in a better position than if the contract had been performed. *Pounds v. Hosp. Auth. of Gwinnett County*, 197 Ga. App. 598, 599(1) (399 S.E.2d 92) (1990); *City of Atlanta v. J.A. Jones Constr. Co.*, 195 Ga. App. 72, 75(3) (392 S.E.2d 564) (1990), rev'd on other grounds, 260 Ga. 658(1) (398 S.E.2d 369) (1990).

Interest on a commercial account cannot be recovered absent an invoice and demand for payment prior to suit, causing the sum to become due and payable, and the opportunity to pay to avoid the imposition of such interest.

Appendix C

"In the absence of a liquidated demand, O.C.G.A. § 7-4-16 is inapplicable." *Typo-Repro Svcs. v. Bishop*, 188 Ga. App. 576, 579(2) (373 S.E.2d 758) (1988); see also *Dalcor Mgmt. v. Sewer Rooter, Inc.*, 205 Ga. App. 681, 682-683(4) (423 S.E.2d 419) (1992). Defendant never rendered an invoice for a liquidated claim due by the plaintiff as a liquidated demand prior to suit, but sued for breach of contract for future damages, which it sought to accelerate under the Agreement and which was contested. As such, the claim was not for a commercial account, allowing prejudgment damages, but a breach of contract action only. See O.C.G.A. § 7-4-16; *Dalcor Mgmt. v. Sewer Rooter, supra* at 683; see also *Trebor Corp. v. Nutmeg Indus.*, 208 Ga. App. 697, 698(1) (431 S.E.2d 402) (1993). As a breach of contract action only, PDS was entitled to prejudgment interest only from the time of the award of the arbitrator. See *Southern Water Technologies v. Kile*, 224 Ga. App. 717, 720(4) (481 S.E.2d 826) (1997); *Hayden v. Sigari*, 220 Ga. App. 6, 11(8) (467 S.E.2d 590) (1996).

(b) In entering his award, the arbitrator manifestly disregarded the law, regarding penalties, which he expressly recognized by identifying the damages as a penalty and not liquidated damages; thus, he did not merely erroneously interpret the law. See *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997).

While PDS invoked arbitration under the Federal Arbitration Act, which the Agreement did not specify, all the parties who were not bound by the Agreement subsequently agreed in court to submit to this arbitration; thus, such agreement to arbitration would appear to be under the Georgia Act rather than the Federal Arbitration Act. O.C.G.A. § 9-9-1 et seq.;

Appendix C

Greene v. Hundley, 266 Ga. 592, 594(1) (468 S.E.2d 350) (1996); *Cotton States Mut. Ins. Co. v. Nunnally Lumber Co.*, 176 Ga. App. 232, 236-237(4) (335 S.E.2d 708) (1985). However, we do not have to decide such issue, because Georgia courts will not confirm an arbitration award that constitutes a manifest disregard of the law applicable under the Federal Arbitration Act. *Ralston v. City of Dahlonega*, 236 Ga. App. 386, 390-391(6) (512 S.E.2d 300) (1999); *Bartlett v. Dimension Designs, Ltd.*, 195 Ga. App. 845, 848 (395 S.E.2d 64) (1990), rev'd on other grounds, *Pace Construction Corp. v. Northpark Assn.*, 215 Ga. App. 438, 439 (450 S.E.2d 828) (1994).

Where an arbitration occurs under the Federal Arbitration Act, if the arbitrator manifestly disregarded the law, i.e., that he was conscious of and deliberately ignored the law, then Georgia courts will not confirm such arbitration awards. *Ralston v. City of Dahlonega*, *supra* at 391.

(c) The trial court erred in confirming the award where the arbitrator overstepped his authority by manifestly disregarding the statute regarding penalties. O.C.G.A. § 9-9-13(b)(3); *Greene v. Hundley*, *supra* at 596(3); *Mid-American Elevator Co., Inc., v. Gemco Elevator Co., Inc.*, 183 Ga. App. 88, 89 (357 S.E.2d 838) (1987).

2. The plaintiffs contend that the trial court erred in confirming the arbitration award, because the arbitrator entered an award on a matter that was not submitted to him. Plaintiffs failed to reference the record or give citation of authority, regarding this enumeration of error. Under Court of Appeals Rule 27(c), such enumeration is deemed abandoned.

3. Plaintiffs contend that the trial court erred in awarding attorney fees incurred in responding to plaintiffs' motion and application to vacate and/or modify the arbitration award. We agree.

While the trial court has broad discretion to award attorney fees and expenses of litigation under O.C.G.A. § 9-15-14, the trial court must include in its award findings of conduct authorizing such award or the order must be vacated. *Porter v. Felker*, 261 Ga. 421, 422(3) (405 S.E.2d 31) (1991); see also *City of Cumming v. Realty Dev. Corp.*, 268 Ga. 461, 463(2) (491 S.E.2d 60) (1997); *Coker v. Mosley*, 259 Ga. 781, 782(2)(c) (387 S.E.2d 135) (1990). Thus, the award of attorney fees by the trial court is vacated because no findings as to conduct were made in the judgment.

4. Plaintiffs contend that the trial court erred in awarding postjudgment interest at 18 percent per annum on the principal amount of the award. We agree.

Under Georgia law, 12 percent is the rate of interest, even on commercial accounts, unless the judgment is entered on a written contract, providing for interest at a greater specified rate. O.C.G.A. § 7-4-12; *ADC Constr. Co. v. Hall*, 202 Ga. App. 119, 120 (413 S.E.2d 522) (1991). While Section 1.2 provides that "[e]quipment shall be shipped freight collect or billed according to PDS's standard rates [and that] Customer will pay a late charge at 1.5% per month, but not to exceed the lawful maximum interest rate, on the unpaid balance," such Agreement provision did not apply to the accelerated future license fees as an exception to O.C.G.A. § 7-4-12. From its plain and unambiguous terms, this

provision setting the rate of 1.5 percent per month applied to the initial contract price only. *Sellers v. Nodvin*, 207 Ga. App. 742, 747-748(4) (429 S.E.2d 138) (1993); *Chilivis v. Rogers Oil Co.*, 135 Ga. App. 176, 177(3) (217 S.E.2d 179) (1975). The Agreement, under Section 1.2, only provides for interest for unpaid equipment charges; therefore, since JRC paid all equipment and software charges except 27 months of license fees prior to the acceleration of all future fees, then the Agreement provided no interest rate exception under these facts and circumstances of this case. O.C.G.A. § 7-4-12. Thus, the statutory rate controls, and the trial court erred in using any other rate of interest. Further, since the arbitrator returned a gross sum which was not differentiated by consequential damages and interest, any interest awarded would be interest upon interest.

5. Plaintiffs contend that the trial court erred in awarding the defendants post-award prejudgment interest on the principal amount of the award. We agree.

Defendants sought to recover interest on the accelerated payment of future licensing fees as liquidated damages before the arbitrator. The arbitrator's award was a gross sum and not separated into damages and prejudgment interest. Interest cannot be recovered upon interest, as the trial court appears to have granted. See *State Hwy. Dept. v. Godfrey*, 118 Ga. App. 560, 561(2) (164 S.E.2d 340) (1968); see also *Hubbard v. McRae*, 95 Ga. 705, 707, 22 S.E. 714 (1895).

Judgment affirmed in part and reversed in part.

Andrews, P.J., and Miller, J., concur.

APPENDIX D — ORDER CONFIRMING ARBITRATION AWARD OF THE SUPERIOR COURT OF GWINNETT COUNTY, STATE OF GEORGIA DATED FEBRUARY 9, 2001 AND FILED FEBRUARY 12, 2001

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE NO. 99A-3362-4

JEFFERSON RANDOLPH CORPORATION
d/b/a JRC TRUCKING

Plaintiff,

vs.

PROGRESSIVE DATA SYSTEMS, INC.;
WILLIAM A. CROZIER, JR.; and THOMAS G. TRAYLOR,

Defendants,

vs.

JEFFERSON RANDOLPH CORPORATION
d/b/a JRC TRUCKING and THURMAN CARPETS, INC.,

Counterclaim Defendants,

ORDER CONFIRMING ARBITRATION AWARD

On December 8, 1999 this Court entered an order granting Defendants' motion to stay the above-styled action to compel arbitration. The parties subsequently proceeded

to arbitrate all disputes between them on July 26 and 27, 2000 with Defendants, Progressive Data Systems, Inc., William Crozier, and Thomas Traylor, as claimants and Jefferson Randolph Corporation d/b/a, JRC Trucking, and Thurman Carpets, Inc., as respondents (hereinafter "Claimants" and "Respondents" respectively).

After the hearing and submission of evidence and legal memoranda the arbitrator issued his award on August 18, 2000. In the award, an original of which has been filed of record, the arbitrator rejected all of Respondents' claims and found in favor of Claimants on their claim that respondents breached the agreement between the parties. Claimants were awarded $81,540.00 in damages, $64,875.00 in attorney's fees, $2,487.01 in administrative fees and expenses, and $1,782.99 in compensation and expenses for the arbitrator. The total amount of the award was $150,685.00. *See* Exhibit A, a true and correct copy of the Arbitration Award.

On September 1, 2000 Claimants filed an Application to Confirm Arbitration Award and for Final Judgment pursuant to the Federal Arbitration Act. In this application Claimants sought to confirm the award in the amount of $150,685, plus post-award, pre-judgment interest at the contractual and commercial liquidated account rate of 18% per annum, and post-judgment interest at the contractual rate of 18%.

On October 2, 2000 Respondents filed a response opposing the requested confirmation of the award. They argued that the Georgia Arbitration Code precluded confirmation. Claimants replied that even assuming the Georgia Arbitration Act were applicable the award was subject to confirmation.

Appendix D

Subsequently, on October 12, 2000 Respondents filed a motion and application to vacate and/or modify the arbitration award. They sought to vacate or modify under both the Federal Arbitration Act and the Georgia Arbitration Code, arguing that the arbitrator overstepped his authority, exceeded his authority, manifestly disregarded the law, and the award was arbitrary and capricious and violated the public policy of the State of Georgia.

Claimants responded to the motion to vacate/modify contesting Respondents' positions. On December 4, 2000 this Court heard oral argument on Claimants' motion to confirm and Respondents' motion to vacate or modify. The Court has carefully considered the positions of the parties, including the arguments and authorities provided in the supporting briefs and memoranda of law. Based on all matters of record, the Court finds and rules as follows:

1. Claimants' Application for Order Confirming Arbitration Award and for Final Judgment is **GRANTED**; and

2. Respondents' Motion and Application to Vacate and Modify Commercial Arbitration Award is **DENIED**.

Therefore, IT IS HEREBY

ORDERED that the arbitrator's award is confirmed in its entirety, with Claimants being awarded jointly and severally against Respondents $81,540.00 in damages, $64,875.00 in attorney's fees, $2,487.01 in administrative fees and expenses, and $1,782.99 in compensation and

expenses. for the arbitrator. The total amount of the award is $150,685.00. This award shall bear post-award, pre-judgment interest at the contractual and commercial liquidated rate of 18% per annum. The post-award, pre-judgment interest from August 19, 2000 through January 30, 2001 is $12,261.22 ($74.31/day for 165 days). The principal amount of the award, $150,685.00 bears post-judgment interest at the contractual rate of 18% per annum.

It is further **ORDERED** that Claimants' request for attorney's fees for the post-arbitration confirmation request and opposition to Respondents' motion to vacate is **GRANTED**, and Claimants are awarded attorney's fees and expenses of $5,000.00.

It is therefore **ORDERED** that Claimants have a final judgment jointly and severally against Respondents in the total amount of $167,946.22 ($150,685 plus $5,000.00 plus $12,261.22 pre judgment interest), together with post judgment interest at the rate of 18% per annum.

So ORDERED this 9th day of February, 2001.

s/ Michael C. Clark
Michael C. Clark
Judge Superior Court
Gwinnett Judicial Circuit

APPENDIX E — FINAL JUDGMENT OF THE SUPERIOR COURT OF GWINNETT COUNTY, STATE OF GEORGIA DATED FEBRUARY 9, 2001 AND FILED FEBRUARY 12, 2001

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE NO. 99A-3362-4

JEFFERSON RANDOLPH CORPORATION
d/b/a JRC TRUCKING

Plaintiff,

vs.

PROGRESSIVE DATA SYSTEMS, INC.;
WILLIAM A. CROZIER, JR.;
and THOMAS G. TRAYLOR,

Defendants,

vs.

JEFFERSON RANDOLPH CORPORATION d/b/a
JRC TRUCKING and THURMAN CARPETS, INC.,

Counterclaim Defendants.

FINAL JUDGMENT

This Court has entered an Order Confirming Arbitration Award providing that Progressive Data Systems, Inc., William A. Crozier and Thomas G. Traylor have judgment jointly and severally against Jefferson Randolph Corporation d/b/a JRC Trucking and Thurman Carpets, Inc., in the total amount of $167,946.22, with the principal amount of $150,685.00 bearing post-judgment interest at the rate of 18% per annum.

Appendix E

Therefore, it is hereby ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be entered as follows:

All claims of Jefferson Randolph Corporation d/b/a JRC Trucking and Thurman Carpets, Inc., are denied and are dismissed with prejudice and Defendants recover all costs of the action; and

Progressive Data Systems, Inc., William A. Crozier and Thomas G. Traylor are awarded jointly and severally against Plaintiff and Thurman Carpets, Inc., a final judgment of $167,946.22 consisting of $150,685.00 awarded by the arbitrator ($81,540.00 in damages, $64,875.00 in attorney's fees, $2,487.01 in administrative fees and expenses, and $1,782.99 in compensation and expenses for the arbitrator), $5,000.00 in additional attorney's fees and $12,261.22 in post-award, pre-judgment interest. The principal amount of the award, $150,685.00 shall bear post-judgment interest at the rate of 18% until paid.

So ORDERED this 9th day of February, 2001.

s/ Michael C. Clark
Judge Superior Court
Gwinnett Judicial Circuit

APPENDIX F — AMERICAN ARBITRATION ASSOCIATION, ARBITRATION TRIBUNAL DATED AUGUST 18, 2000

AMERICAN ARBITRATION ASSOCIATION
Arbitration Tribunal

AWARD OF THE ARBITRATOR

In the Matter of the Arbitration between

PROGRESSIVE DATE SYSTEMS, INC.,
WILLIAM A. CROZIER, JR., AND THOMAS G. TRAYLOR
(Claimants)

-And-

JEFFERSON RANDOLPH CORPORATION, d/b/a
JRC TRUCKING, INC., AND THURMAN CARPETS, INC.
(Respondents)

CASE NUMBER: 30 117 01110 99

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above named parties, and dated May 24, 1996 and having been duly sworn and having duly heard the proofs and allegations of the parties, FIND as follows:

I find the following as a matter of fact:

a) The Claimants did not commit fraud;

b) The Claimants were not in breach of the contract; and

c) The Respondents were in breach of the contract.

Appendix F

I find the following as a matter of law:

a) Neither the contract nor the software was properly rejected, rescinded or revocated.

b) The acceleration clause on the contract was a penalty and unreasonable before, during and after the execution of the contract.

Therefore, I Award as follows: The Respondents shall pay to the Claimants the sum of EIGHTY-ONE THOUSAND FIVE HUNDRED FORTY DOLLARS AND NO CENTS ($81,540.00) within thirty (30) days from the date of this signed Award.

On the claim, the Respondents shall pay to the Claimants the sum of SIXTY-FOUR THOUSAND EIGHT HUNDRED SEVENTY-FIVE DOLLARS AND NO CENTS ($64,875.00) for attorney fees.

The administrative fees and expenses of the American Arbitration Association totaling TWO THOUSAND NINE HUNDRED SEVENTY-FOUR DOLLARS AND ONE CENT ($2,974.01) shall be borne entirely by the Respondents. Therefore, the Respondents, shall pay to the Claimants the sum of TWO THOUSAND FOUR HUNDRED EIGHTY-SEVEN DOLLARS AND ONE CENT ($2,487.01) for that portion of the administrative fees and expenses previously advanced by the Claimant to the Association.

Appendix F

The compensation and expenses for the arbitrator totaling FOUR THOUSAND FIVE HUNDRED SIXTY-TWO DOLLARS AND NO CENTS ($ 4,562.00) shall be borne entirely by the Respondents. Therefore, the Respondents shall pay to the Claimants the sum of ONE THOUSAND SEVEN HUNDRED EIGHTY-TWO DOLLARS AND NINETY-NINE CENTS ($1,782.99) for that portion of compensation and expenses for the arbitrator previously advanced by the Claimant to the Association. The Respondents shall pay to the American Arbitration Association the sum of NINE HUNDRED NINETY-SIX DOLLARS AND ONE CENT ($996.01) for said compensation still due to the arbitrator.

This Award is in full settlement of all claims submitted to this arbitration.

s/ Henry M. Abelman
Henry M. Abelman
DATE: 08/18/00